STATE OF MICHIGAN

IN THE SUPREME COURT

THE ESTATE OF MARGARETTE F. EBY,
Deceased, by its Personal Representative,
DAYLE TRENTADUE,

Plaintiff-Appellee,

-vs-

MFO MANAGEMENT COMPANY,
BUCKLER AUTOMATIC LAWN SPRINKLER
COMPANY, SHIRLEY GORTON, and
LAURENCE W. GORTON,

Defendants-Appellants,
and

JEFFREY GORTON, VICTOR NYBERG,
TODD MICHAEL BAKOS, and CARL
L. BEKOFSKE, as Personal representative of the
Estate of RUTH R. MOTT, deceased,

Defendants.
_____/

Supreme Court Nos. 128579,
128623, 128624, 128625

Court of Appeals No. 252155,
252207, 252209

Lower Court No. 02-074145-NZ

AMICUS CURIAE BRIEF OF CHANNING POLLOCK, GEORGE BUTLER, JOSEPH TEMPLET, WILLIAM GRASSEL (DECEASED), KENNETH BROWN, DANIEL MCGRATH AND OTHER SIMILARLY SITUATED INDIVIDUALS SUFFERING FROM ASBESTOS-RELATED DISEASE IN SUPPORT OF PLAINTIFF-APPELLEE

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Channing Pollock, George Butler, Joseph Templet, William Grassel (deceased), Kenneth Brown, and Daniel McGrath, file this Amicus Curiae Brief on behalf of themselves and other similarly situated individuals. These individuals suffer from lung disease as a result of their exposure to asbestos, and currently have cases pending to recover for their disease in the Wayne County Circuit Court.

Channing Pollock is 78 years old and was exposed to asbestos from 1937 to 1976. In April 2005, he was diagnosed with mesothelioma. His case was filed in July 2005. Wayne County Circuit Court No. 05-521873-NP. Trial in Mr. Pollock's case is scheduled for March 2007.

George Butler is 77 years old and was exposed to asbestos from 1946 to 1990. In October 2004, he was diagnosed with mesothelioma. His case was filed in May 2005. Wayne County Circuit Court No. 05-517868-NP. Trial is scheduled for September 2007.

Joseph Templet is 78 years old and was exposed to asbestos from 1954 to 1983. In January 2004, he was diagnosed with lung cancer. His case was filed in April 2005. Wayne County Circuit Court No. 05-506494-NP. Trial is scheduled for March 2007.

William Grassel was 82 years old at the time of his death. He was exposed to asbestos from 1945 to 1985. He was diagnosed with cancer in August 2005. His case was filed in October 2005. Wayne County Circuit Court Case No. 05-529908-NP. Trial is scheduled for September 2007.

Kenneth Brown is 72 years old and was exposed to asbestos from 1955 to 1976. In May 2003 he was diagnosed with asbestosis. His case was filed in December of 2004. Wayne County Circuit Court No. 04-438731-NP. Trial is scheduled for March 2007.

Daniel McGrath is 70 years old and was exposed to asbestos from 1954 to 1990. In

December of 2004 he was diagnosed with asbestosis. His case was filed in December of 2004. Wayne County Circuit Court No. 04-438731-NP. Trial is scheduled for March 2007.

There are thousands of individuals in the same position as these six individuals, who suffer from asbestos-related disease and have cases pending in the Michigan courts. There are many thousands more who will contract asbestos-related disease in the coming years and, if they are to find redress for their injuries, will need to seek a remedy in the courts. *See*, Michigan Supreme Court ADM File No. 2003-47 and n.14, *infra*.

Under *Larson v Johns-Manville Sales Corp,* 427 Mich 301, 314; 399 NW2d 1 (1986), asbestos-related disease and other toxic tort claims arguably "accrue" under the "discovery rule". *See also, Henry v Dow Chemical Co*, 473 Mich 63, 99, n. 29; 701 NW2d 684 (2005). In granting leave to appeal in this case, the Court has ordered the parties to brief the issue of "whether the Court of Appeals application of a common law discovery rule to determine when plaintiff's claims accrued is consistent with or contravenes MCL 600.5827, and whether previous decisions of this Court, which have recognized and applied such a rule, when MCL 600.5827 would otherwise control, should be overruled." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 475 Mich 906; 717 NW2d 329 (2006).

Thus, the Court's decision in this case has the potential to affect the determination of when the claims of these individuals accrued and whether their cases, and those of others similarly situated, were or will be timely filed. The six individuals identified above, therefore, have a real and present interest in how this case is decided.

Cases involving latent disease or injury contracted from much earlier toxic exposures constitute a large class of the cases in which the so-called "discovery rule" has been applied to

determine accrual. *See*, *Henry*, *supra* at 83-86. However, the plaintiff in the present case is not a victim of toxic exposure, nor is latent disease involved. Rather, the question of discovery in this case concerns when the "cause" of the injury was known, as opposed to when the "injury" element of the claim was or should have been discovered. This *Amicus Curiae* brief, accordingly, has a somewhat different focus than the brief of which has been filed by the plaintiff-appellant -- it specifically examines the "injury" component of the "discovery" rule. Its aim is to provide the Court with legal analysis and information relative to the effects this Court's decision could potentially have upon the claims of those who develop latent diseases as a result of toxic exposures. .

STATEMENT OF QUESTIONS PRESENTED

I. UNLESS IT FIRST DETERMINES THAT THE "DISCOVERY RULE", AS FORMULATED BY THE MICHIGAN COURTS, ACTUALLY APPLIES TO THIS CASE, SHOULD THIS COURT REFUSE TO DECIDE THE QUESTION OF "WHETHER THE COURT OF APPEALS APPLICATION OF A COMMON LAW DISCOVERY RULE TO DETERMINE WHEN PLAINTIFF'S CLAIMS ACCRUED IS CONSISTENT WITH OR CONTRAVENES MCL 600.5827, AND WHETHER PREVIOUS DECISIONS OF THIS COURT, WHICH HAVE RECOGNIZED AND APPLIED SUCH A RULE, WHEN MCL 600.5827 WOULD OTHERWISE CONTROL, SHOULD BE OVERRULED"?

Amicus Curiae says "yes".
Defendant-Appellant does not answer this question.
Plaintiff-Appellee does not answer this question.

II. IF THIS COURT DOES DECIDE TO ADDRESS THE QUESTION OF THE CONTINUED VIABILITY OF THE "DISCOVERY RULE" IN THE CONTEXT OF THIS CASE, SHOULD IT MAKE CLEAR THAT IT IS NOT CHANGING THE LAW WHICH GOVERNS THE ACCRUAL OF TOXIC TORT CLAIMS AS RECENTLY AFFIRMED IN *HENRY V DOW CHEMICAL CO,* 473 MICH 63; 701 NW2d 684 (2005)?

Amicus Curiae says "yes".
Defendant-Appellant does not answer this question.
Plaintiff-Appellee does not answer this question.

III. IS MICHIGAN LAW REGARDING ACCRUAL OF TOXIC TORT CLAIMS SEEKING RECOVERY FOR LATENT DISEASE, WHETHER CLASSIFIED AS FALLING UNDER THE NAME "DISCOVERY RULE" OR NOT, CONSISTENT WITH MCL 600.5827?

Amicus Curiae says "yes".
Defendant-Appellant would say "no".
Plaintiff-Appellee would say "yes".

STATEMENT OF FACTS AND PROCEEDINGS

Amicus Curiae rely upon the Statement of Facts and Proceedings contained in the Brief of Plaintiff-Appellee.

ARGUMENT

I. UNLESS IT FIRST DETERMINES THAT THE "DISCOVERY RULE", ACTUALLY APPLIES TO THIS CASE, THIS COURT SHOULD NOT DECIDE THE QUESTION OF "WHETHER THE COURT OF APPEALS APPLICATION OF A COMMON LAW DISCOVERY RULE TO DETERMINE WHEN PLAINTIFF'S CLAIMS ACCRUED IS CONSISTENT WITH OR CONTRAVENES MCL 600.5827, AND WHETHER PREVIOUS DECISIONS OF THIS COURT, WHICH HAVE RECOGNIZED AND APPLIED SUCH A RULE, WHEN MCL 600.5827 WOULD OTHERWISE CONTROL, SHOULD BE OVERRULED."

While this Court unquestionably has the authority to raise issues *sua sponte, see*, *Mack v City of Detroit,* 467 Mich 1211; 654 NW2d 563 (2002)(Young, J. and Corrigan, J., concurring), it has traditionally done so only in limited circumstances, "'where justice so required.'" *People v Hermiz*, 462 Mich 71, 77; 611 NW2d 783 (opinion of Taylor, J.). Here, in its order granting leave to appeal, the Court directed the parties to brief the issue of "whether the Court of Appeals application of a common law discovery rule to determine when plaintiff's claims accrued is consistent with or contravenes MCL 600.5827, and whether previous decisions of this Court, which have recognized and applied such a rule, when MCL 600.5827 would otherwise control, should be overruled." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 475 Mich 906; 717 NW2d 329 (2006). This is not an issue that was previously raised by the parties, nor is it one that was addressed by either the circuit court or the Court of Appeals. Amicus respectfully suggests that this is a case where "justice requires" that this Court address the issues it has raised with respect to the discovery rule only if it first determines that this is a case in which that issue is truly "ripe" for consideration[1].

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[1]While admittedly not presenting an issue of "ripeness" in a true Constitutional sense, the same considerations that inform this Court's decision of whether a case is justiciable come into play in determining whether this Court should reach the issue of the whether prior cases recognizing the "discovery rule" should be overturned.

Without taking a position on whether the "discovery rule" as developed in Michigan jurisprudence over the last several decades[2] applies to the facts of this case, Amicus would urge this Court to *first* consider *that* question. [3] For it is only *if* the Court determines that the rule *does* apply, *i.e.*, that the equitable considerations and balancing of statute of limitations purposes require application of the rule to this case[4], that it should *then* determine whether all of the past precedents

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> The "judicial power" has traditionally been defined by a combination of considerations: the *existence of a real dispute, or case or controversy*; *the avoidance of deciding hypothetical questions*; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making. *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614-615; 684 NW2d 800 (2004) (emphasis added).

It is only if this Court decides that the long-established discovery rule *does* apply to this case that the question of whether that rule *should* be overturned is actually raised.

[2] The first case in which this Court appears to have adopted the "discovery rule", at least as designated by that name, was *Johnson v Caldwell*, 371 Mich 368, 379; 123 NW2d 785 (1963), some 43 years ago. However, equitable principles essentially identical to the "discovery rule" have been a part of Michigan common law for a much longer period of time. *See, e.g., Phillips v United States Benevolent Society*, 120 Mich 142; 79 NW 1 (1899), in which the Court permitted recovery on an accident policy which required that notice be given within a certain time as a condition precedent to recovery, even though the period for giving notice had expired, because the beneficiary lacked knowledge that his disability had been caused by the accident; *Lukazewski v Sovereign Camp Of The Woodmen Of The World,* 270 Mich 415; 259 NW 307 (1935), in which the beneficiary of a fraternal death certificate was permitted to recover even though the one year period for bringing suit had expired, because despite diligent search and inquiry the beneficiary was unable to discover the insured's death until approximately seven years later.

[3]This is the issue before the Court as presented by the questions raised in Defendants-Appellants' Applications for leave to appeal.

[4] In *Goodridge v Ypsilanti Township Board*, 451 Mich 446, 453-454;547 NW2d 668 (1996) this Court described the process employed in deciding whether to use the "discovery rule" to determine accrual:

of this Court recognizing such a rule should be overruled. In other words, if this is not a case where the discovery rule applies, this case does not present an appropriate vehicle for this Court to decide the broader question of whether that rule should continue to exist or whether that rule is consistent with MCL 600.5827. It would be doing so under hypothetical circumstances, rather than in the context of a true controversy that squarely presents the question.

This Court's stated reluctance to overrule precedent also counsels that it should exercise judicial restraint and reach this question of the continued recognition of the discovery rule only if it is required to do so. As this Court explained in *Pohutski v City of Allen Park*, 465 Mich 675, 693; 641 NW2d 219 (2002):

> We do not lightly overrule precedent. Stare decisis is generally '"the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."' *Robinson, supra* at 463, 613 N.W.2d 307 quoting *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 LEd2d 242 (1998). Before we overrule a prior decision, we must be convinced 'not merely that the case was wrongly decided, but also that less injury will result from overruling

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> The question whether to add a "discovery rule" to a limitation period that does not contain such an express provision has arisen in several cases in recent years. (Footnote omitted.) We recently addressed the subject in *Stephens v Dixon*, 449 Mich 531; 536 NW2d 755 (1995). There we noted that the statutes of limitations "are procedural devices intended to promote judicial economy and the rights of defendants." 449 Mich at 534; 536 NW2d 755. Such statutory provisions "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence." 449 Mich at 534; 536 NW2d 755.
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> In *Stephens*, we then discussed the policy considerations in relation to the imposition of a discovery rule. 449 Mich at 535-536; 536 NW2d 755. We summarized the competing policies by explaining that "in deciding whether to strictly enforce a limitation period or impose the discovery rule, we must carefully balance when the plaintiff learned of her injuries, whether she was given a fair opportunity to bring her suit, and whether defendant's equitable interests would be unfairly prejudiced by tolling the statute of limitations." 449 Mich at 536; 536 NW2d 755.

than from following it.' *McEvoy v. Sault Ste Marie*, 136 Mich. 172, 178, 98 NW 1006 (1904).

This Court cannot render a decision on the question of whether all discovery rule cases were wrongly decided, or determine the effects and consequences of a decision to that effect within the confines of a case in which the rule is not even applicable. *Stare decisis* should not be abandoned in a case where the Court was not required to overrule precedent to reach a decision, particularly with respect to a principle such as the "discovery rule", which is so entrenched in Michigan law. *See*, *Goodridge v Ypsilanti Township Board,* 451 Mich 446, 453-454; 547 NW2d 668 (1996). It is thus imperative for this Court to first decide whether the discovery rule, as formulated, applies to this case.

II. IF THIS COURT DOES DECIDE TO ADDRESS THE QUESTION OF THE CONTINUED VIABILITY OF THE "DISCOVERY RULE" IN THE CONTEXT OF THIS CASE, IT SHOULD MAKE CLEAR THAT IT IS NOT CHANGING THE LAW WHICH GOVERNS THE ACCRUAL OF TOXIC TORT CLAIMS AS RECENTLY AFFIRMED IN *HENRY V DOW CHEMICAL CO,* 473 MICH 63; 701 NW2d 684 (2005).

If this Court decides that this case is one in which the "discovery rule" applies, then in addressing whether continued recognition of that rule is inconsistent with or contravenes MCL 600.5827, it must be careful to define precisely what it means by "discovery rule". As formulated by this Court, the discovery rule has two prongs: "[U]nder the discovery rule, the plaintiff's claim accrues when the plaintiff discovers, or through the exercise of reasonable diligence, should have discovered . . . (1) an injury, and (2) the causal connection between plaintiff's injury and the defendant's breach." *Moll v Abbot Laboratories,* 444 Mich 1, 16; 506 NW2d 816 (1993). Some cases in which the discovery rule has been applied involve both of the prongs identified in *Moll*. For

example, in the DES cases presented in *Moll*, plaintiffs' acquisition of information about both their injuries and their causal connection to DES was at issue. *Id* at 6-9, 28-29. The present case potentially involves the second prong discussed in *Moll*, knowledge of causation. The injury involved in this case, death, was immediately known, but the negligence or cause responsible for that death was not discovered until much later. *Trentadue v Buckler Automatic Sprinkler Co*, 266 Mich App 297, 302-303; 701 NW2d 756 (2005). By contrast, asbestos-related disease cases, such as those in which the Amici are involved, concern only the first prong (injury) -- such plaintiffs are aware of their toxic exposure (which puts them at risk for development of serious or fatal lung diseases), but because of the latency period for the diseases involved, the injury manifests itself long after the exposure. *See, Larson v Johns-Manville Sales Corp,* 427 Mich 301, 309, 314-314, 319; 399 NW2d 1 (1986)..

This Court has already determined that causes of action involving the development of latent disease following toxic exposures, such as the development of cancer or mesothelioma following inhalation of asbestos fibers, accrue when there is a present, manifest physical injury. *Henry v Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005). In *Henry*, this Court made this point abundantly clear. There, this Court refused to recognize a cause of action for medical monitoring under Michigan law. *Id* at 68, 102. The basis for its holding was that a person who has been exposed to a toxic substance may have an increased risk of developing a disease, such as cancer, in the future, but he has not suffered a *present* physical injury, and therefore no cognizable claim has accrued under long-standing Michigan tort law principles. 473 Mich at 67-68; 73-74.

> Thus, *Larson [v Johns-Manville Sales Corp*, 427 Mich 301; 399 NW2d 1 (1986)] squarely rejects the proposition that mere exposure to a toxic substance and the increased risk of future harm constitutes an "injury" for tort purposes. It is a *present*

> injury, not fear of an injury in the future, that gives rise to a cause of action under negligence theory.
>
> *Id.* at 72-73.

Repeatedly in *Henry,* this Court stressed the "vast" and "great" "weight of Michigan precedent which requires a ***manifest*** physical injury in order to state a viable negligence claim." *Id* at 81, fn 11 (emphasis added); 74-76. In refusing to change the elements of a negligence claim to allow recovery upon exposure, rather than manifestation of injury, the Court explained that such a change "could drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care." *Id* at 84. Finally, this Court emphasized in *Henry* that once an injury caused by toxic exposure *does* manifest itself, the person injured then has a viable claim that has accrued and can be pursued to recovery. *Id.* at 98-99. In its decision in *Henry*, the majority specifically ruled that there would be no statute of limitations problem presented to a plaintiff in these circumstances:

> We also note that there would be no statute of limitations problems for such a plaintiff. Under the *so-called*[5] *'discovery rule', a cause of action 'accrues' in the toxic tort context when an injured party knows or should have known of the manifestation of the injury.* See e.g. *Larson, supra* at 314; 399 NW2d 1. Provided that the injured person brings an action within three years of the date he knows of should have known of a dioxin-related injury, the statute of limitations would be satisfied. See MCL 600.5805(10).
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> *Id.* at 99, n. 29 (emphasis added).

Thus, in *Henry*, it was because this Court recognized that those who suffer from latent diseases (such

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[5]It is interesting that the Court in *Henry* chose to refer to it as the "so-called 'discovery rule'". It is an apt description because, in fact, the "discovery" of injury is not the factor that governs accrual or an asbestos claim. It is "manifestation" of injury that is the triggering event -- i.e., when the plaintiff actually suffers an evident, present physical injury as a result of the exposure. *Henry*, 473 Mich at 74-76, 81 fn11.

as cancer, due to much earlier toxic exposures[6]) may pursue a viable recovery once the disease (injury) becomes evident, and because it recognized that limited judicial and social resources were more effectively spent in helping those who actually suffer from such disease, that the Court determined in *Henry* an expansion of tort law to recognize a claim for medical monitoring was ill-advised.

By its decision in *Henry*, this Court has, therefore, already determined that, called by whatever name, the critical factor that determines accrual of a toxic tort claim is the present physical injury that is suffered when that disease becomes manifest -- before manifestation of the disease, there is no injury. The statute of limitations only begins to run at that point in time.

If this Court does reach the issue of the continued viability of the "discovery rule" in deciding the instant case, it should therefore do so narrowly -- making clear that its decision in *Henry* is not to be disturbed. To do otherwise has the potential to cause massive confusion and chaos in the already bewildering sea of asbestos litigation[7], and cause panic among thousands of asbestos-disease

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[6] The time between exposure to asbestos and the onset of resulting lung disease (asbestosis, cancer, mesothelioma) is between 10 and 40 years. *Larson*, 427 Mich at 307.

[7]Clearly, this Court is no stranger to asbestos litigation and recognizes that there are many hundreds of such cases pending in our courts. It has issued and considered Administrative Orders with the objective of helping the courts and parties deal with this massive area of litigation. *See*, ADM File No. 2003-47, Proposed Administrative Order Regarding Asbestos-Related Disease Litigation (February 23, 2006) and related documents; ADM File No. 2003-47, In Re Petition for Administrative Order or Court Rule Establishing Inactive Asbestos Docketing System (September 11, 2003) and related documents; Administrative Order No. 2006-6, Prohibition on "Bundling" Cases (August 9, 2006). Additionally, this Court is aware, as reflected in the documentation considered with respect to ADM File No. 2003-47, that legislation has been introduced in both houses of the Michigan Legislature concerning asbestos claims and litigation. Senate Bill No. 1123 (introduced March 9, 2006) and House Bill No. 5851 (introduced March 9, 2006). Both proposed bills contain identical provisions regarding accrual that are consistent with this Court's opinions in *Larson*, *supra* and *Henry*, *supra*:

victims, or those who have been exposed to asbestos and bear the risk of future illness, who will rightfully view their right of recovery as being in jeopardy. Further, it would reopen the issue of whether Michigan recognizes or should recognize a cause of action for medical monitoring, since the entire legal basis for the decision not to do so in *Henry* rests on the linchpin that toxic exposure claims do not accrue until there is manifest present injury (sometimes referenced in terms of "discovery" -- i.e., the condition is known or objectively knowable; *see e.g., Larson*, supra).[8]

> Sec. 3009(1) The period of limitation for an asbestos or silica claim that is not barred as of the effective date of the amendatory act that added this chapter accrues when the exposed person discover, or through the exercise of reasonable diligence should have discovered, that he or she is physically impaired by an asbestos- or silica-related condition.
>
> (2) An asbestos or silica claim arising our a nonmalignant condition is a distinct cause of action from an asbestos or silica claim relating to the same exposed person arising out of asbestos- or silica-related cancer.
>
> (3) Damages for fear or risk of cancer shall not be awarded in a civil action asserting an asbestos or silica claim.
>
> (4) The settlement of a non-malignant asbestos or silica claim concluded after the effective date of the amendatory act that added this chapter shall not require, as a condition of the settlement, the release of any future claim for asbestos- or silica-related cancer.

[8] *Larson*, too, contains an illustration of the inconsistency between denying recovery absent a physical injury and a holding that a claim may be barred by the statute of limitations before physical injury is manifest:

> Therefore '[i]f a worker files suit on the day he commences or terminates employment which involves breathing asbestos dust, he may as yet have no signs of developing asbestosis. Such a suit would be readily dismissed since there has been no injury, and thus no "cause of action shall have accrued." It would be unreasonable to dismiss the plaintiff's suit because there was no injury and then not allow him to bring the suit years later when asbestosis develops on the ground that the claim is barred by the statute of limitations.' *Strickland v Johns-Manville Int'l Corp*, 461 F Supp 215, 217 (SD Tex 1978). *See also, Harig v Johns-Manville Products Corp*, 284 Md 70, 80-81, 394 A2d 299 (1978) (it cannot be said that the tort victim can be

III. MICHIGAN LAW REGARDING ACCRUAL OF TOXIC TORT CLAIMS SEEKING RECOVERY FOR LATENT DISEASE, WHETHER CLASSIFIED AS FALLING UNDER THE NAME "DISCOVERY RULE" OR NOT, IS CONSISTENT WITH AND DOES NOT CONTRAVENE MCL 600.5827.

Although decided under the rubric of the "discovery rule", toxic tort claims actually meet the definition of accrual under MCL 600.5827; the claim does not arise until there is *a manifest* injury. The injury is "discovered" only in the sense that the disease can be ascertained at that point; some physical harm has occurred. Therefore, as explicated in the following section, application of the so-called "discovery rule" in cases concerning latent disease due to toxic exposures is completely consistent with MCL 600.5827.

MCL 600.5827 is part of the Revised Judicature Act (RJA), which was passed in 1961 and became effective in 1963. *See*, historical and statutory notes to MCLA 600.5827. The statute states:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done, regardless of the time when damage results.

The language of the statute seems fairly straightforward -- unless some other statutory provision applies, the limitations period begins to run when the claim accrues, and the claim accrues "at the time the wrong upon which the claim is based was done". The key step is to decide the question: What is the "wrong" that the claim is based on? Once that is determined, then the "time" of that "wrong" must be fixed. The final phrase indicates that the fact that damages may result after that date does not change when the claim is deemed to accrue.

> charged with slumbering on his rights, for there was no notice of the existence of a cause of action.).

427 Mich at 311.

While this Court has stressed that the language of the statute is the most important, and in most cases, the only factor in determining legislative intent, *Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 281; 696 NW2d 646 (2005), in the case of the RJA, the legislature provided a different rule of construction. *Denham v Bedford,* 407 Mich 517, 528; 287 N.W.2d 168 (1980). "This act is remedial in character, and shall be *liberally* construed to *effectuate the intents and purposes* thereof." MCL 600.102 (emphasis added). By legislative fiat, the primary goal when this Court construes the provisions of the RJA is not to be a "strict" construction of the language, but rather the construction needed to give effect to the intents and *purposes* behind the statute. By its plain language, this provision instructs the Court to go beyond the words and to give primary importance to eliciting and effectuating the statute's purpose.

In the case of MCL 600.5827, both the language of the statute and its purpose indicate that it is consistent with, and indeed subsumes the "discovery rule" as applied to toxic tort cases involving latent disease. Looking first to the language, as explained above, the word that is of primary importance is "wrong", for it is the time of the "wrong" that determines accrual. *Boyle v General Motors Corp*, 468 Mich 226, 231; 661 NW2d 557 (2003). Where a statute does not provide its own definition, this Court has indicated that it is appropriate to consult a dictionary to determine meaning. *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005). Because the RJA is a statute that concerns legal procedure, *Sam v Balardo*, 411 Mich 405, 423-424 and fn18, fn19; 308 NW2d 142 (1981), drafted by "a distinguished committee of lawyers", *id* at 424, and the subject here is the legal concept of "accrual", a legal dictionary seems most appropriate. *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 440; 716 NW2d 247 (2006), MCL 8.3.

Black's Law Dictionary (8th ed, 2004) provides this definition of "wrong":

> **wrong**, n. Breach of one's legal duty; violation of another's legal right.-- wrong, vb. "A wrong may be described, in the largest sense, as anything done or omitted contrary to legal duty, considered in so far as it gives rise to liability." Frederick Pollock, A First Book of Jurisprudence 68 (1896).
>
> "A wrong is simply a wrong act -- an act contrary to the rule of right and justice. ***A synonym of it is injury***, in its true and primary sense of injuria (that which is contrary to jus) ...." John Salmond, Jurisprudence 227 (Glanville L. Williams ed., 10th ed. 1947). (Emphasis added.)

Because "wrong" is defined to have the same meaning as "injury", a comprehensive understanding also requires an examination of the definition of "injury".

> **injury**, n. 1. The *violation* of another's legal right, *for which the law provides a remedy; a wrong or injustice*. See WRONG. 2. Scots law. Anything said or done in breach of a duty not to do it, *if harm results to another in person*, character, or property. • Injuries are divided into real injuries (such as wounding) and verbal injuries (such as slander). They may be criminal wrongs (as with assault) or civil wrongs (as with defamation). 3. *Any harm or damage.* • Some authorities distinguish harm from injury, holding that while harm denotes any personal loss or detriment, *injury involves an actionable invasion of a legally protected interest.* (Emphasis added).

Thus, per the legal dictionary, the term "wrong" connotes that some harm or actionable invasion of a right has occurred. This is, notably, consistent with this Court's analysis in *Henry,* where it concluded that victims of toxic exposure have no actionable claim, (i.e., no claim has accrued), until they have suffered physical injury. *Supra* at 67-68, 73-74, *see also*, *Boyle v General Motors Corp*, 468 Mich 226, 231, n. 5; 661 NW2d 557 (2003), where, in construing MCL 600.5827, this Court stated: "The wrong is done when the plaintiff is harmed rather than when the defendant acted." (Citation omitted).

Such a meaning of the term "wrong" is also consistent with the context in which it is used -- a statute defining when a claim accrues. Looking to the definition of the word "accrue", it becomes apparent that the concept of "injury" must be inherent in the term "wrong" as used in MCL

600.5827.

> **accrue,** vb. 1. To come into existence as an enforceable claim or right; to arise "the plaintiff's cause of action for silicosis did not accrue until the plaintiff knew or had reason to know of the disease". [...]
>
> "The term 'accrue' in the context of a cause of action means to arrive, to commence, to come into existence, or to become a present enforceable demand or right. The time of accrual of a cause of action is a question of fact." 2 Ann Taylor Schwing, California Affirmative Defenses § 25:3, at 17-18 (2d ed. 1996).
>
> *Black's Law Dictionary* (8th ed, 2004).

Because the event of the "wrong" marks when a claim becomes enforceable, it is only the most basic common sense to read the word as referring to an actionable wrong. As this Court recognized in *Henry*, *supra*, it is one of the most fundamental principles of tort law that there is no actionable wrong until there is a present injury. 473 Mich at 74-75.

In addition to looking to the dictionary, where the RJA fails to provide its own definition, the accepted common law definition of the word is also pertinent in determining meaning. *Sam v Balardo*, 411 Mich at 424-425; *accord, Ford Motor Co*, *supra*, 475 Mich at 439. Consistent with the dictionary definition, at the time the RJA was written, Michigan common law treated the word "wrong" as synonymous with "injury".

> The words "wrong" and "injury" are often used the one for the other. An injury to the person is a wrong, and a constructive injury to the person is also a wrong. A wrong is defined to be an injury, and an injury as a wrong. A personal wrong or injury is an invasion of a personal right; it pertains to the person, the individual. A cause of action growing out of a personal wrong is one designed to protect or secure some individual right.
>
> *People v Quanstrom,* 93 Mich 254, 257;53 NW 165 (1892).

This Court has continued to view the terms as virtually identical for purposes of determining accrual under MCL 600.5827. *See*, *Joliet v Pitoniak*, 475 Mich 30, 40-41; 715 NW2d 60 (2006).

"This Court follows the principle that when a statute dealing with the same subject uses a common-law term and there is no clear legislative intent to alter the common law, this Court will interpret the statute as having the same meaning as under the common law." *Ford Motor Co, supra* at 439. Even if a statute deals with new or different subject matter, the assumption is that common law meanings apply in the absence of evidence to the contrary. *Id.* It is presumed that the Legislature is aware of the existing common law and of judicial interpretations of existing law when it acts. *Id* at 439-440, *Wold Architects and Engineers v Strat*, 474 Mich 223, 234; 713 NW2d 750 (2006). Accordingly, since the RJA does not provide any definition of the term "wrong" and there is no direction to the contrary, the common law meaning given to that word must be utilized in construing MCL 600.5827. *People v Gahan*, 456 Mich 264, 272; 571 NW2d 503 (1997). Thus, "wrong" should be read to mean "actionable injury", as per the common law and legal dictionary definitions.

To read "wrong" as meaning, in essence, "actionable injury" is consistent not only with common law definitions of the term, but with the common law practice of determining when claims accrue. The RJA was not intended to make changes in substantive areas of policy; rather, its purpose is remedial in nature as it was designed to improve and organize legal procedural requirements. *Sam, supra* at 423-424 (including primary sources cited therein). In defining when a claim accrues in MCL 600.5827, the Legislature gave no indication whatsoever that it was attempting to change the common law definition of substantive rights, or redefine when a claim would become actionable. *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 150-151; 200 NW2d 70 (1972).

Connelly recounted the long-established, pre-RJA rule of accrual for tort claims[9] and held that in indicating that a claim accrues when the "wrong ... was done, regardless of when the damage results" (MCL 600.5827), the Legislature was not creating a new rule that a claim accrues when there is a breach of duty, even though no injury has resulted from that breach. *Id* at 151. Rather, the *Connelly* Court explained that the Legislature was simply codifying existing law on accrual:

> Defendants argue that the statutory provision '* * * the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results' means, in the context of this case, that claims against them are barred, since the breach of duty claimed against them must have occurred prior to March 15, 1965, more than three years before action was commenced.
>
> Defendants contend that the word *Wrong* refers to an act of carelessness or negligence in repairing or handling the press. By their view, the word *Damage* refers to the personal injury suffered by the plaintiff on May 12, 1965, the day that the press malfunctioned.
>
> Defendants claim that interpreting the word *Wrong* to mean Actionable wrong, tort, harm or Injury is to broaden the meaning of that word, and render the word *Damage* entirely meaningless.
>
> * * *

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[9]In *Connelly*, this Court ruled:

> "In the case of an action for damages arising out of tortious injury to a person, the cause of action accrues when all of the elements of the cause of action have occurred and can be alleged in a proper complaint. These elements are four in number.
> (1) The existence of a legal duty by defendant toward plaintiff.
> (2) The breach of such duty.
> (3) A proximate causal relationship between the breach of such duty and an injury to the plaintiff.
> (4) The plaintiff must have suffered damages." *Connelly*, 388 Mich at 150.

Significantly, this statement of when a tort claim accrues, or becomes actionable, is for all practical purposes identical to that made by this Court with respect to the accrual of a negligence claim just last year in *Henry v Dow Chemical Co*, 473 Mich at 74: "(1)duty, (2)breach, (3)causation, and (4) damages."

> The word *Damage* is not rendered meaningless in a fair reading of the statute, even there the word *Wrong* is understood to mean actionable wrong.
>
> It is quite common in personal injury actions to allege and prove future loss of earning capacity, future medical expenses, future pain and suffering. Indeed all of these elements must be alleged and proved in a single cause of action. *Once all of the elements of an action for personal injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run.* Later damages may result, but they give rise to no new cause of action, nor does not statute of limitations begin to run anew as each item of damage is incurred.
>
> 388 Mich at 150, 151 (emphasis added).

Thus, *Connelly* recognized that the RJA did not change the bedrock, common law rule that an injury is required for accrual. This is the same principle which this Court recently emphasized in *Henry.*

The *Connelly* Court was correct in its holding. At the time the RJA was enacted, the common law had long recognized that claims accrued at the time an actionable injury was suffered, and that subsequent damages that might occur did not give rise to a later accrual time or begin the statute of limitations running again.

> A right of action accrues whenever such a breach of duty or contract has occurred, or such a wrong has been sustained, as will give right to then bring and sustain a suit. That the statute begins to run from the time that a right of action accrues, without regard to when the actual damage results, is well settled. 26 Cyc. 1065, 1069, 116, and cases cited: *Wilcox v Plummer*, 4 Pet. 172, 7 L.Ed. 821(1830).
>
> If an act occur, whether it be a breach of contract or duty which one owes another or the happening of a wrong, whether willful or negligent, by which one sustains an injury, however slight, for which the law gives a remedy, that starts the statute. ... The fact that the actual or substantial damages were not discovered or did not occur until later is of no consequence. ...
>
> There is a class of actions for consequential damages which are distinguishable from the class to which we refer and from the one at bar. The breach of duty or other wrongful act may or may not be legally injurious to the plaintiff until he has suffered some consequence therefrom. Thus a railway may be operated without the exercise of statutory precautions intended to safeguard the public. But until one has sustained some injury in consequence, he has no right of action. It is the duty of a municipality

> to maintain its streets so that they may be safely used by the public. But the mere fact that a street is in a dangerous condition will not give a right of action to every one who chooses to sue. It is only when some injury has occurred as a consequence that the statute begins to run against the injured person's right of action.
>
> *Aachen & Munich Fire Ins Co v Morton,* 156 F 654, 84 CCA 366 (CA6 1907); s*ee also*, *National Copper Co v Minnesota Mining Co*, 57 Mich 83; 23 NN 781 (1885).

In that way, a distinction was drawn at common law between the injury or damages that made the breach of duty actionable -- where one could say that a "wrong" had occurred -- and subsequent, consequential damages that flowed from or were associated with that "wrong".

The principle that an injury must occur for there to be an actionable wrong is also strongly linked with doctrines of justiciability, such as standing and mootness. This Court has held that these doctrines affect "'judicial power'", "the absence of which renders the judiciary constitutionally powerless to adjudicate the claim." *Michigan Chiropractic Council v Commissioner of the Office of Financial and Insurance Services*, 475 Mich 363, 372; 716 NW2d 561 (2006). For example, one of the elements necessary to establish standing is that the "plaintiff has suffered a concrete, 'injury in fact'". *Id* at 371. Relatedly, the doctrine of ripeness "prevents the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id* (citations omitted). A reading of MCL 600.5827 to allow accrual without the occurrence of a determinable, present injury directly contravenes these doctrines of justiciability for it would then legislate that claims are actionable even absent objective evidence of a concrete injury (standing) and even though the occurrence of disease is at that point hypothetical, and may not occur at all (ripeness). In *Henry*, this Court expressly recognized that "the requirement of a present physical

injury avoids compromising the judicial power." 473 Mich at 77.

It would be illogical to assume that the Legislature intended the courts to exercise authority outside the constitutionally-established "judicial power", and if it did so intend, this would raise significant separation of powers questions. *See National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 616-625; 684 NW2d 800 (2004). "In cases of [constitutional] doubt, every possible presumption, not clearly inconsistent with the language and the subject matter, is to be made in favor of the constitutionality of the act." *Sears v Cottrell*, 5 Mich 251, 259 (1858). To construe the term "wrong" as meaning a manifest, actionable injury is not inconsistent with its language, and is consonant with the subject matter of MCL 600.5827, namely accrual.

The concept of a wrong or injury as an element of an actionable claim also encompasses the concept that the wrong is objectively knowable. *Karl v Bryant Air Conditioning Co (In re: Certified Questions),* 416 Mich 558, 573; 331 NW2d 456 (1982). In *Henry* this Court repeatedly used the term "manifest" physical injury when detailing the type of injury required for an actionable negligence claim. 473 Mich at 72-73, 81 fn11, 99 and fn29, 100, 101. In other words, the injury must be "apparent to the senses", "evident", or "obvious". *Webster's New World Dictionary of the American Language* (2nd Concise ed, 1995), 455[10]. In the vast majority of tort cases where a breach of duty occurs, the injury will be traumatic and immediate, and thus there would be no need to expressly indicate in a general accrual statute, such as MCL 600.5827,that the injury or wrong must be "manifest" before a claim accrues. But the requirement that the injury be objectively knowable is certainly implicit in the statute, just as it is implicit in the body of tort law concerning the elements necessary to state a legally viable claim. *Henry, supra* at 76-78.

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[10]Definition of the adjective "manifest".

Indeed, this concept is deeply imbedded in Michigan jurisprudence and the traditional common law of accrual. Repeatedly, Michigan courts have emphasized not only that all the necessary elements must have occurred for a cause of action to accrue, but that plaintiff must be able to allege those elements in a proper complaint.[11] In other instances, our courts have said that the injury must be "identifiable and appreciable".[12] Both phrases implicitly recognize that it must be possible for the plaintiff to know she has an injury before the claim will accrue. In fact, at least twice, without relying on the "discovery rule", this Court has read MCL 600.2587, as construed in *Connelly*, to provide that a claim does not accrue and the statute of limitations does not begin to run until the plaintiff knows or should know of an actionable injury. *Williams v Polgar*, 391 Mich 6, 25; 215 NW2d 149(1974)[13], *Stephens v Dixon*, 449 Mich 531, 539; 536 NW2d 755 (1995)[14].

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[11] "Prior to the adoption of RJA, it was settled that a cause of action accrues at the moment when the plaintiff could first commence a lawsuit upon it. In the case of an action for damages arising out of tortious injury to a person, the cause of action accrues when all of the elements of the cause of action have occurred and can be alleged in a proper complaint." *Connelly*, *supra* at 149-150.

"A claim accrues when all the necessary elements have occurred and can be alleged in a proper complaint." *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 244; 492 NW2d 512 (1992) (Corrigan, J.).

"A plaintiff's cause of action accrues when all the elements have occurred and can be alleged in a complaint." *Jackson County Hog Producers v Consumers Power Co*, 234 Mich App 72, 78; 592 NW2d 112 (1999).

[12] "It is, however, the fact of identifiable and appreciable loss, and not the finality of monetary damages that gives birth to the cause of action." *Luick v Rademacher*, 129 Mich App 803, 806; 342 NW2d 617 (1984).

"However, harm is established not by the finality of the damages, but by the occurrence of identifiable and appreciable loss." *Gebhardt v O'Rourke*, 444 Mich 535, 545; 510 NW2d 900 (1994).

[13] While later classified as a "discovery rule" case (*Larson,* 427 Mich at 309), the *Williams* Court did not talk about the discovery rule or of a need to look beyond MCL 600.5827. It stated:

Michigan case law concerning "fraudulent concealment" of a cause of action also confirms this "knowledge" or "awareness" component of accrual. In explaining that it is only fraud intended to conceal the fact of the existence of a cause of action that will toll the statute of limitations under the fraudulent concealment statute (now MCL 600.5855), the courts have made clear that this is because once a person knows a claim exists then he has the means available to pursue a legal remedy, and therefore the limitations period begins to run.

> 'It is not necessary that a party should know the details of the evidence by which to establish his cause of action. *It is enough that he knows that a cause of action exists*

> Under these standards, is there a tort cause of action accruing before plaintiff has knowledge, or should have knowledge, of the negligent misrepresentation? We think not.
>
> General tort law principles in Michigan as discussed *supra*, support our determination that the statute of limitations does not begin running until the point where plaintiff knows or should have know of this negligent misrepresentation. At that point, the four elements in *Connelly*, *supra*, are satisfied: a legal duty exists, such duty is breached, a proximate causal relation is established (if plaintiff can show reliance on the abstract), and the plaintiff then is, or should be, aware of any resultant damage.
>
> 391 Mich at 25.

[14] While the *Stephens* Court did talk about the "discovery rule", it only did so after first recognizing:

> A simple negligence cause of action accrues when a prospective plaintiff first knows or reasonably should know he is injured. As we stated in *Connelly*:
>
> > Once all of the elements of an action for personal injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run. Later damages may result, but they give rise to no new cause of action, nor does the statute of limitations begin to fun anew as each item of damage is incurred. [388 Mich at 151, 200 NW2d 70]
>
> 449 Mich at 538.

> *in his favor*, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting or preserving his claim.' 37 CJ 976.
>
> So even if the covenant be set aside for fraud, *the statute of limitations is operative if plaintiffs knew they had a cause of action against defendant.*
>
> *Weast v Duffie*, 272 Mich 534, 539; 262 NW 401 (1935)(emphasis added); *See also, Kroll v Vanden Berg*, 336 Mich 306, 311-312; 57 NW2d 897 (1953).[15]

The fact that injury must be objectively knowable or manifest to constitute an actionable "wrong" is further consistent with the most basic purpose of the statute of limitations. Justice Cooley explicated this premise over a century ago in *Toll v Wright*, 37 Mich 93, 1877 WL 3785, *6 (1877): [T]he idea of a statute of limitations is only this: that the remedy of the party is to be taken away because he is unreasonably negligent in the assertion of his rights." If the injury is not "manifest" or "identifiable and appreciable", the plaintiff cannot be deemed to have acted unreasonably in not bringing the claim. He has no way of knowing a claim exists or setting it forth in a complaint. *Larson*, *supra* at 311. As this Court put it in *Henry*, *supra*, at 77: "The present physical injury requirement establishes a clear standard by which judges can determine which plaintiffs have stated a valid claim and which have not."

The reason for this knowledge component to accrual is common sense and the recognition of the need to avoid constitutional questions as to the validity of MCL 600.5827. First, as has been

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[15] *Kroll* was a medical malpractice case in which the Court refused to apply the "fraudulent concealment" provision to toll the statute of limitations, and found that the two-year statute of limitations began to run on plaintiff's claim from the date the plaintiff knew of the existence of the needle in her abdomen. *Id.* It was the knowledge of injury that cause the claim to accrue for purposes of the limitations period.

repeatedly stressed, except in "topsy-turvy land"[16], it makes no sense to say that a person's cause of action is barred before they even have a reasonable opportunity to recognize that they have an injury (*i.e*, that they have been the victim of an actionable "wrong"). It would be impossible for a plaintiff to bring a claim before the information is available from which she can even glean that a claim exists. In the case of victims seeking recovery for asbestos-related disease, as are Amici, there is simply no way to objectively determine injury until 10 to 40 years after exposure, when diseases, such as cancer, asbestosis, or mesothelioma, are first diagnosed. *Henry*, *supra* at 72-73, 77-78; *Larson*, *supra* at 311 and n4. Thus, a reading of accrual in MCL 600.2587 that ignores the inherent need to be able to know of the injury before being required to file a claim, would convert the statute of limitations into a statute that abrogates all latent disease cases because of an impossible requirement (*i.e.*, that a cause of action be brought before there is a cause of action) -- something there is no indication, by language or otherwise, that the Legislature had any intention of doing. Practically speaking, at what point *would* an asbestos-related disease victim be able to bring a claim if it accrued before he had information that he was injured by asbestos; particularly in light of this Court's ruling in *Henry* that, until the injury is manifested, there is no cause of action which the

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[16]"Topsy-turvy land" first appeared in the dissenting opinion of Judge Jerome Frank in *Dincer v Marlin Firearms Co*, 198 F2d 821, 823 (CA2, 1952) and has since been quoted in numerous cases concerning the statute of limitations, including this Court's decision in *Moll v Abbot Laboratories*, 444 Mich 1, 12, n. 15; 506 NW2d 816 (1993) when it applied the "discovery rule" to DES cases:

> "Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal 'axiom,' that a statute of limitations does not begin to run against a cause of action before the cause of action exists, i.e., before a judicial remedy is available to the plaintiff."

plaintiff could institute.

This question leads directly to the serious constitutional that is raised if a plaintiff's claim can be deemed to accrue before it is even possible for her to know that she has a claim. At its most basic, if read to mean that an asbestos-related disease claim accrues, and that the statute of limitations would therefore expire before the person could possibly know that they had been "wronged" or suffered a physical injury, MCL 600.5827 would violate due process. Justice Cooley recognized long ago that while the Legislature clearly has the authority to create statutes of limitations, those procedural statutes cannot abrogate the substantive claim which they seek to limit:

> The general power of the legislature to pass statutes of limitation is not doubted. The time that these statutes shall allow for brining suits is to be fixed by legislative judgment, and where the legislature has fairly exercised its discretion, no court is at liberty to review its action, and to annul the law, because in their opinion the legislative power was unwisely exercised. *But the legislative authority is not so entirely unlimited that, under the name of a statute limiting the time within which a party shall resort to his legal remedy, all remedy whatsoever may be taken away. ... It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought* [citations omitted]; *and a statute that fails to do this cannot possibly be sustained as a law of limitation, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law.*
>
> *Price v Hopkin*, 13 Mich 318,324 (1865) (emphasis added).

In *Dyke v Richards*, 390 Mich 739;213 NW2d 185 (1973), the Court applied the constitutional requisite that statutes of limitations must permit a reasonable time for bringing claims, and refused to read the "last date of treatment" accrual provision, stated in the then newly-enacted RJA malpractice statute of limitations, as inconsistent with previous law. Existing law held that the limitations period did not begin to run until the plaintiff discovered or in the exercise of reasonable diligence could have discovered the wrongful act. The Court accepted the plaintiff's argument that

it would violate due process if the time of accrual preceded the ability to be aware of the claim, and therefore read the accrual statute, MCL 600.5838[17], to include a discovery provision. *Supra* at 747. Relying on Justice Cooley's rationale in *Price*, *supra*, the *Dyke* Court concluded:

> ...[A] statute which extinguishes the right to bring suit cannot be enforced as a law of limitation. As to a person who does not know, or in the exercise of reasonable diligence could not ascertain within the two year period that he has a cause of action, this statute has the effect of abolishing his right to bring suit.
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> Such a statute, if sustainable at all could be enforced only as one intended to abolish a common law cause of action. But this statute does not purport to do this, is not

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[17] At the time *Dyke* was decided, this statute provided: "A claim based on the malpractice of a person who is, or holds himself out to be, a member of a state licensed profession accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim for malpractice arose." Following *Dyke*, a malpractice claim was also deemed to accrue at the time that the plaintiff knew or should have known that a wrongful act had occurred. The period of limitations was two years. MCL 600.5805(3).

In 1986, the Legislature shortened the statute of limitations for claims which accrued under the "discovery rule" from two years to 6 months in MCL 600.5838a(3):

> (3) An action involving a claim based on medical malpractice under the circumstances described in subsection (2)(a) to (c) may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A medical malpractice action which is not commenced within the time prescribed by this subsection is barred. (PA 1986, No. 178 §3).

Thus, where the Legislature desires to change a "discovery rule" accrual adopted by this Court, it has demonstrated that it can and will do so. Noticeably, it has never done so with respect to other tort law claims where the "discovery rule" has been applied. In fact, by deciding to simply shorten, rather than do away, with the "discovery rule" for accrual of malpractice actions, the Legislature has implicitly indicated its recognition of the necessity for such a common law rule.

asserted to do so, and we cannot ascribe any legislative intention to accomplish that end.

390 Mich at 746-747.

Similarly, MCL 600.5827, if read to abrogate all toxic tort/latent injury claims, such as those involving asbestos-related disease, would also violate due process. In essence, because of the length of time it takes for asbestos-related disease to manifest itself, absent an accrual standard that acknowledges that a plaintiff must be objectively able to know that he has been injured before the limitations period begins to run, all such claims would be barred before they could be brought. Neither MCL 600.5827 nor MCL 600.5805(13) (the 3-year limitations period applicable to product liability actions) contains any language demonstrating a legislative intention to abolish all toxic tort/latent injury claims. Rather, the statutes only evidence an intent to impose a limitation on the period of time in which a claim can be brought, and that period must be a reasonable one, or it violates due process. *Dyke, supra; Price, supra.*

This Court has struggled with the "absurdity rule"(i.e., that a statute will be construed to avoid absurd results) as a rule of statutory construction, with at least 3 "textualist" members of this Court strongly voicing their opposition to its use. *See, Cameron v Auto Club Ins*, 476 Mich 55; 718 NW2d (2006)[18]. However, the result of construing MCL 600.5827 as inconsistent with or not

[18]A review of the opinions of the various Justices of this Court in *Cameron* would seem to indicate that Justices Taylor, Corrigan and Young reject the "absurd result" rule, but might agree with Justice Markman's statement of the rule, in the appropriate case, if the issue were presented. Justice Markman indicates that he would follow Justice Scalia in rejecting statutory language as creating an "absurd result" when the language "'cannot rationally... mean' what it seems to mean"; i.e., it is "obviously senseless, illogical or untrue". *Id* at 84-85. Justices Kelly, Cavanaugh and Weaver believe that the "absurd result" rule, as developed in Michigan jurisprudence prior to its rejection in *People v McIntire*, 461 Mich 147; 599 NW2d 102 (1999), continues to be correct. *Id* at 103 fn12, 104 fn1, 110-113.

including a requirement that the "wrong" be objectively knowable before the claim accrues, is completely irrational and it also raises weighty questions as to the constitutional validity of the provision, as outlined in the preceding paragraphs. In such circumstances, even the strictest textualists, such as United States Supreme Court Justice Scalia, have indicated that it is appropriate to give a meaning to the statutory language that does not result in such "absurdity". [19] To read MCL

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[19]John F. Manning, *Textualism and the Equity of the Statute*, 101 Columbia Law Review 1, 116-117 (2001) :

> Given that textualists apply the doctrine of absurdity infrequently, it is difficult to distill a single definitive textualist explanation of that doctrine. Still, at least one textualist account of the absurdity doctrine seeks to draw a principled line between absurdity and the more discretionary authority associated with strong purposivism or the equity of the statute. First, Justice Scalia limits the absurdity doctrine to cases in which the statute will bear the plausible alternative meaning required to avoid an absurd result Second, he has sought to limit the doctrine to absurdities so extreme that they almost certainly reflect "scrivener's errors." Importantly, in at least some cases he seems to have anchored the second limitation to instances in which the more natural textual meaning would pose serious constitutional questions under the rational-basis test.
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> Justice Scalia's concurrence in Green v. Bock Laundry Machine Co illustrates both points. Bock Laundry turned on Rule 609(a)(1) of the Federal Rules of Evidence, which in relevant part allows the impeachment of a witness's credibility using specified categories of criminal convictions, but only if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." The principal statutory question in Bock Laundry was whether "defendant" should be read to include both civil and criminal defendants, or should be limited to criminal defendants. Reading defendant broadly to include the civil context would create an asymmetrical benefit favoring civil defendants over civil plaintiffs, because such a defendant could never be ***117** prejudiced by introducing impeachment evidence against the plaintiff's witnesses. Justice Scalia's separate opinion read the rule narrowly, however, to require prejudice-balancing only in cases involving criminal defendants. Although acknowledging that the most natural use of "defendant" includes both civil and criminal defendants, Justice Scalia reasoned that such an interpretation "produces an absurd, and perhaps unconstitutional, result." He concluded that "[t]he word 'defendant' in Rule 609(a)(1) cannot rationally (or perhaps even constitutionally) mean to provide the benefit of prejudice-weighing to civil defendants and not civil plaintiffs." In other words, any attempt by Congress

600.5287 to mean that the claim must be objectively "knowable" or "discovera ble" is not inconsistent with its language, and the idea that it must be possible for a person to be aware of their injury before being required to bring a claim is logically implicit in the entire concept of accrual.

Finally, consistent with the mandate of MCL 600.102, that this Court construe MCL 600.5827 "to effectuate the intents and purposes thereof", it is evident that such a construction requires recognition that for a "wrong" to have been done, there must be a manifest or knowable physical injury. This Court has already gone through the analysis when it adopted what it termed a "discovery rule" of accrual for asbestos-related disease claims in *Larson, supra.* There the Court summarized the two "primary purposes" behind the statute of limitations. The first was to "encourage plaintiffs to pursue claims diligently". *Id* at 311. The Court found that since there is no interest in encouraging someone to diligently pursue a claim when they are unable to determine that they have been injured, thus making their claim subject to summary dismissal, the adoption of the "discovery rule" would not contravene this first purpose. *Id* at 311-312. The second purpose it recognized was "to protect defendants from having to defend against stale or fraudulent claims". *Id* at 311. The Court found that there would be no interference with this policy either. Although the Court acknowledged that adoption of the "discovery rule" would increase the time during which defendants would be subject to suit, it concluded that evidence relating to the issues to be litigated

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> to distinguish between the two would raise a serious constitutional question under the rational-basis test. But because the law often gives "special protection to defendants in criminal cases," Justice Scalia believed that there was a rational basis for asymmetrical prejudice-weighing in criminal prosecutions. Although equating "defendant" with "criminal defendant" was not the most natural reading of the text, Justice Scalia emphasized that doing so would "not give the word a meaning . . . it simply will not bear." Rather, "[t]he qualification . . . is one that could understandably have been omitted by inadvertence--and sometimes is omitted in normal conversation ('I believe strongly in defendants' rights')." (Footnotes omitted.)

did not dissipate with time, and might actually tend to develop as time passed. *Id* at 312-313. It ultimately agreed with the logic of courts in other jurisdictions that "[t]he only practical time when the cause of action can be deemed to have accrued is the time when the plaintiff knows or should have known that he had" asbestos-related disease. *Id* at 313.

CONCLUSION

When viewed in the context of latent injury cases, such as those involving asbestos-related disease, the "discovery rule" is not really an exception on policy or equitable grounds to the generally applicable rule of accrual in tort cases. Actually, it is an application of the basic rule of tort recovery (i.e., the plaintiff must suffer a manifest physical injury to have an actionable claim) to cases involving non-traumatic injuries. Accordingly, if this Court decides to address the continued viability of the "discovery rule" in light of MCL 600.5827, it should recognize that in the context of toxic tort/latent disease actions, application of that rule is completely consistent with the statute; actually it is subsumed by the statute. In writing its opinion in this case, Amici therefore respectfully request that this Court will make explicit, if necessary, that its decision does not change the law of accrual with respect to claims based on latent disease due to toxic exposures..

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